

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

APRIL DAVIS, MAHMOOD
DAWOOD, and RHIANA
CALKINS,

Plaintiffs,

v.

THE KROGER COMPANY

Defendant.

Case No. 2:22-cv-02082-MEMF-
RAO

~~PROPOSED~~ STIPULATED
PROTECTIVE ORDER¹

DISCOVERY MATTER

1. A. PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of confidential, proprietary or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends

¹ This Stipulated Protective Order is substantially based on the model protective order provided under Magistrate Judge Rozella A. Oliver's Procedures.

1 only to the limited information or items that are entitled to confidential treatment
2 under the applicable legal principles.

3
4 B. GOOD CAUSE STATEMENT

5 This action is likely to involve confidential financial, marketing, product
6 formulation, and other commercial information for which special protection from
7 public disclosure and from use for any purpose other than prosecution of this action
8 is warranted. Such confidential and proprietary materials and information consist
9 of, among other things, confidential business or financial information, information
10 regarding confidential business practices, or other confidential research,
11 development, or commercial information (including information implicating privacy
12 rights of third parties), information otherwise generally unavailable to the public, or
13 which may be privileged or otherwise protected from disclosure under state or
14 federal statutes, court rules, case decisions, or common law. Accordingly, to
15 expedite the flow of information, to facilitate the prompt resolution of disputes over
16 confidentiality of discovery materials, to adequately protect information the parties
17 are entitled to keep confidential, to ensure that the parties are permitted reasonable
18 necessary uses of such material in preparation for and in the conduct of trial, to
19 address their handling at the end of the litigation, and serve the ends of justice, a
20 protective order for such information is justified in this matter. It is the intent of the
21 parties that information will not be designated as confidential for tactical reasons
22 and that nothing be so designated without a good faith belief that it has been
23 maintained in a confidential, non-public manner, and there is good cause why it
24 should not be part of the public record of this case.

25
26 C. ACKNOWLEDGMENT OF PROCEDURE FOR FILING UNDER SEAL

27 The parties further acknowledge, as set forth in Section 12.3, below, that this
28 Stipulated Protective Order does not entitle them to file confidential information

1 under seal; Local Civil Rule 79-5 sets forth the procedures that must be followed
2 and the standards that will be applied when a party seeks permission from the court
3 to file material under seal.

4 There is a strong presumption that the public has a right of access to judicial
5 proceedings and records in civil cases. In connection with non-dispositive motions,
6 good cause must be shown to support a filing under seal. *See Kamakana v. City and*
7 *County of Honolulu*, 447 F.3d 1172, 1176 (9th Cir. 2006); *Phillips v. Gen. Motors*
8 *Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002); *Makar-Welbon v. Sony Electronics,*
9 *Inc.*, 187 F.R.D. 576, 577 (E.D. Wis. 1999) (even stipulated protective orders
10 require good cause showing), and a specific showing of good cause or compelling
11 reasons with proper evidentiary support and legal justification, must be made with
12 respect to Protected Material that a party seeks to file under seal. The parties' mere
13 designation of Disclosure or Discovery Material as CONFIDENTIAL does not—
14 without the submission of competent evidence by declaration, establishing that the
15 material sought to be filed under seal qualifies as confidential, privileged, or
16 otherwise protectable—constitute good cause.

17 Further, if a party requests sealing related to a dispositive motion or trial, then
18 compelling reasons, not only good cause, for the sealing must be shown, and the
19 relief sought shall be narrowly tailored to serve the specific interest to be protected.
20 *See Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 677-79 (9th Cir. 2010). For
21 each item or type of information, document, or thing sought to be filed or introduced
22 under seal in connection with a dispositive motion or trial, the party seeking
23 protection must articulate compelling reasons, supported by specific facts and legal
24 justification, for the requested sealing order. Again, competent evidence supporting
25 the application to file documents under seal must be provided by declaration.

26 Any document that is not confidential, privileged, or otherwise protectable in
27 its entirety will not be filed under seal if the confidential portions can be redacted.
28 If documents can be redacted, then a redacted version for public viewing, omitting

only the confidential, privileged, or otherwise protectable portions of the document shall be filed. Any application that seeks to file documents under seal in their entirety should include an explanation of why redaction is not feasible.

2. DEFINITIONS

2.1 Action: *Davis et al. v. the Kroger Company*, Case No. 2:22-cv-02082-MEMF-RAO.

2.2 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.3 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c), and as specified above in the Good Cause Statement.

2.4 Counsel: Outside Counsel of Record and House Counsel (as well as their support staff).

2.5 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

2.6 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things) that are produced or generated in disclosures or responses to discovery in this matter.

2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this Action.

2.8 House Counsel: attorneys who are employees of a party to this Action. House Counsel does not include Outside Counsel of Record or any other outside counsel.

2.9 Non-Party: any natural person, partnership, corporation, association or other legal entity not named as a Party to this action.

2.10 Outside Counsel of Record: attorneys who are not employees of a party to this Action but are retained to represent or advise a party to this Action and have appeared in this Action on behalf of that party or are affiliated with a law firm that has appeared on behalf of that party, and includes support staff.

2.11 Party: any party to this Action, including all of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

2.12 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this Action.

2.13 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.14 Protected Material: any Disclosure or Discovery Material that is designated as “CONFIDENTIAL.”

2.15 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material.

Any use of Protected Material at trial shall be governed by the orders of the trial judge. This Order does not govern the use of Protected Material at trial.

1 4. DURATION

2 Once a case proceeds to trial, information that was designated as
3 CONFIDENTIAL or maintained pursuant to this protective order used or introduced
4 as an exhibit at trial becomes public and will be presumptively available to all
5 members of the public, including the press, unless compelling reasons supported by
6 specific factual findings to proceed otherwise are made to the trial judge in advance
7 of the trial. *See Kamakana*, 447 F.3d at 1180-81 (distinguishing “good cause”
8 showing for sealing documents produced in discovery from “compelling reasons”
9 standard when merits-related documents are part of court record). Accordingly, the
10 terms of this protective order do not extend beyond the commencement of the trial.
11

12 5. DESIGNATING PROTECTED MATERIAL

13 5.1 Exercise of Restraint and Care in Designating Material for Protection.

14 Each Party or Non-Party that designates information or items for protection under
15 this Order must take care to limit any such designation to specific material that
16 qualifies under the appropriate standards. The Designating Party must designate for
17 protection only those parts of material, documents, items or oral or written
18 communications that qualify so that other portions of the material, documents, items
19 or communications for which protection is not warranted are not swept unjustifiably
20 within the ambit of this Order.

21 Mass, indiscriminate or routinized designations are prohibited. Designations
22 that are shown to be clearly unjustified or that have been made for an improper
23 purpose (e.g., to unnecessarily encumber the case development process or to impose
24 unnecessary expenses and burdens on other parties) may expose the Designating
25 Party to sanctions.

26 If it comes to a Designating Party’s attention that information or items that it
27 designated for protection do not qualify for protection, that Designating Party must
28 promptly notify all other Parties that it is withdrawing the inapplicable designation.

1 5.2 Manner and Timing of Designations. Except as otherwise provided in
2 this Order (*see, e.g.*, second paragraph of section 5.2(a) below), or as otherwise
3 stipulated or ordered, Disclosure or Discovery Material that qualifies for protection
4 under this Order must be clearly so designated before the material is disclosed or
5 produced.

6 Designation in conformity with this Order requires:

7 (a) for information in documentary form (*e.g.*, paper or electronic
8 documents, but excluding transcripts of depositions or other pretrial or trial
9 proceedings), that the Producing Party affix at a minimum, the legend
10 “CONFIDENTIAL” (hereinafter “CONFIDENTIAL legend”), to each page that
11 contains protected material. If only a portion of the material on a page qualifies for
12 protection, the Producing Party also must clearly identify the protected portion(s)
13 (*e.g.*, by making appropriate markings in the margins).

14 A Party or Non-Party that makes original documents available for inspection
15 need not designate them for protection until after the inspecting Party has indicated
16 which documents it would like copied and produced. During the inspection and
17 before the designation, all of the material made available for inspection shall be
18 deemed “CONFIDENTIAL.” After the inspecting Party has identified the
19 documents it wants copied and produced, the Producing Party must determine which
20 documents, or portions thereof, qualify for protection under this Order. Then,
21 before producing the specified documents, the Producing Party must affix the
22 “CONFIDENTIAL legend” to each page that contains Protected Material. If only a
23 portion of the material on a page qualifies for protection, the Producing Party also
24 must clearly identify the protected portion(s) (*e.g.*, by making appropriate markings
25 in the margins).

26 (b) for testimony given in depositions: if a document designated
27 CONFIDENTIAL is introduced as an exhibit at a deposition, or if the Producing
28 Party states on the record that the testimony given at the deposition may contain that

1 Party's Confidential Information, that party will have 14 days after receipt of the
2 final transcript to identify the specific portions of the testimony as to which
3 protection is sought. Only those portions of the testimony that are appropriately
4 designated for protection within the 14 days shall be covered by the provisions of
5 this Protective Order.

6 Transcripts containing Protected Material shall have an obvious legend on the
7 title page that the transcript contains Protected Material. The Designating Party shall
8 inform the court reporter of these requirements. During the period prior to and
9 during the 14-day period for designation, all testimony shall be treated as if it had
10 been designated CONFIDENTIAL in its entirety unless otherwise agreed. After the
11 expiration of that period, the transcript shall be treated only as actually designated.

12 (c) for information produced in some form other than documentary and
13 for any other tangible items, that the Producing Party affix in a prominent place on
14 the exterior of the container or containers in which the information is stored the
15 legend "CONFIDENTIAL." If only a portion or portions of the information
16 warrants protection, the Producing Party, to the extent practicable, shall identify the
17 protected portion(s).

18 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
19 failure to designate qualified information or items does not, standing alone, waive
20 the Designating Party's right to secure protection under this Order for such material.
21 Upon timely correction of a designation, the Receiving Party must make reasonable
22 efforts to assure that the material is treated in accordance with the provisions of this
23 Order.

24 25 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

26 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
27 designation of confidentiality at any time that is consistent with the Court's
28 Scheduling Order.

1 6.2 Meet and Confer. The Challenging Party shall initiate the dispute
2 resolution process under Local Rule 37.1 et seq.

3 6.3 The burden of persuasion in any such challenge proceeding shall be on
4 the Designating Party. Frivolous challenges, and those made for an improper
5 purpose (e.g., to harass or impose unnecessary expenses and burdens on other
6 parties) may expose the Challenging Party to sanctions. Unless the Designating
7 Party has waived or withdrawn the confidentiality designation, all parties shall
8 continue to afford the material in question the level of protection to which it is
9 entitled under the Producing Party's designation until the Court rules on the
10 challenge.

11
12 7. ACCESS TO AND USE OF PROTECTED MATERIAL

13 7.1 Basic Principles. A Receiving Party may use Protected Material that is
14 disclosed or produced by another Party or by a Non-Party in connection with this
15 Action only for prosecuting, defending or attempting to settle this Action. Such
16 Protected Material may be disclosed only to the categories of persons and under the
17 conditions described in this Order. When the Action has been terminated, a
18 Receiving Party must comply with the provisions of section 13 below (FINAL
19 DISPOSITION).

20 Protected Material must be stored and maintained by a Receiving Party at a
21 location and in a secure manner that ensures that access is limited to the persons
22 authorized under this Order.

23 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless
24 otherwise ordered by the court or permitted in writing by the Designating Party, a
25 Receiving Party may disclose any information or item designated
26 "CONFIDENTIAL" only to:

27 (a) the Receiving Party's Outside Counsel of Record in this Action, as
28 well as employees of said Outside Counsel of Record to whom it is reasonably

1 necessary to disclose the information for this Action;

2 (b) the officers, directors, and employees (including House Counsel) of
3 the Receiving Party to whom disclosure is reasonably necessary for this Action;

4 (c) Experts (as defined in this Order) of the Receiving Party to whom
5 disclosure is reasonably necessary for this Action and who have signed the
6 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

7 (d) the court and its personnel;

8 (e) court reporters and their staff;

9 (f) professional jury or trial consultants, mock jurors, and Professional
10 Vendors to whom disclosure is reasonably necessary for this Action and who have
11 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

12 (g) employees or representatives of the Designating Party, as reasonably
13 necessary for their depositions in this action;

14 (h) the author or recipient of a document containing the information or a
15 custodian or other person who otherwise possessed or knew the information;

16 (i) during their depositions, witnesses, and attorneys for witnesses, in the
17 Action to whom disclosure is reasonably necessary provided: (1) the deposing party
18 requests that the witness sign the form attached as Exhibit A hereto; and (2) they
19 will not be permitted to keep any confidential information unless they sign the
20 “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise
21 agreed by the Designating Party or ordered by the court. Pages of transcribed
22 deposition testimony or exhibits to depositions that reveal Protected Material may
23 be separately bound by the court reporter and may not be disclosed to anyone except
24 as permitted under this Stipulated Protective Order; and

25 (j) any mediator or settlement officer, and their supporting personnel,
26 mutually agreed upon by any of the parties engaged in settlement discussions.

27
28 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED

1 IN OTHER LITIGATION

2 If a Party is served with a subpoena or a court order issued in other litigation
3 that compels disclosure of any information or items designated in this Action as
4 “CONFIDENTIAL,” that Party must:

5 (a) promptly notify in writing the Designating Party. Such notification
6 shall include a copy of the subpoena or court order;

7 (b) promptly notify in writing the party who caused the subpoena or order
8 to issue in the other litigation that some or all of the material covered by the
9 subpoena or order is subject to this Protective Order. Such notification shall include
10 a copy of this Stipulated Protective Order; and

11 (c) cooperate with respect to all reasonable procedures sought to be
12 pursued by the Designating Party whose Protected Material may be affected.

13 If the Designating Party timely seeks a protective order, the Party served with
14 the subpoena or court order shall not produce any information designated in this
15 action as “CONFIDENTIAL” before a determination by the court from which the
16 subpoena or order issued, unless the Party has obtained the Designating Party’s
17 permission. The Designating Party shall bear the burden and expense of seeking
18 protection in that court of its confidential material and nothing in these provisions
19 should be construed as authorizing or encouraging a Receiving Party in this Action
20 to disobey a lawful directive from another court.

21
22 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE
23 PRODUCED IN THIS LITIGATION

24 (a) The terms of this Order are applicable to information produced by a
25 Non-Party in this Action and designated as “CONFIDENTIAL.” Such information
26 produced by Non-Parties in connection with this litigation is protected by the
27 remedies and relief provided by this Order. Nothing in these provisions should be
28 construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party's confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

(1) promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;

(2) promptly provide the Non-Party with a copy of the Stipulated Protective Order in this Action, the relevant discovery request(s), and a reasonably specific description of the information requested; and

(3) make the information requested available for inspection by the Non-Party, if requested.

(c) If the Non-Party fails to seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order,

1 and (d) request such person or persons to execute the “Acknowledgment and
2 Agreement to Be Bound” that is attached hereto as Exhibit A.

3
4 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
5 PROTECTED MATERIAL

6 When a Producing Party gives notice to Receiving Parties that certain
7 inadvertently produced material is subject to a claim of privilege or other protection,
8 the obligations of the Receiving Parties are those set forth in Federal Rule of Civil
9 Procedure 26(b)(5)(B). This provision is not intended to modify whatever
10 procedure may be established in an e-discovery order that provides for production
11 without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and
12 (e), insofar as the parties reach an agreement on the effect of disclosure of a
13 communication or information covered by the attorney-client privilege or work
14 product protection, the parties may incorporate their agreement in the stipulated
15 protective order submitted to the court.

16
17 12. MISCELLANEOUS

18 12.1 Right to Further Relief. Nothing in this Order abridges the right of any
19 person to seek its modification by the Court in the future.

20 12.2 Right to Assert Other Objections. By stipulating to the entry of this
21 Protective Order, no Party waives any right it otherwise would have to object to
22 disclosing or producing any information or item on any ground not addressed in this
23 Stipulated Protective Order. Similarly, no Party waives any right to object on any
24 ground to use in evidence of any of the material covered by this Protective Order.

25 12.3 Filing Protected Material. A Party that seeks to file under seal any
26 Protected Material must comply with Local Civil Rule 79-5. Protected Material
27 may only be filed under seal pursuant to a court order authorizing the sealing of the
28 specific Protected Material at issue. If a Party’s request to file Protected Material

1 under seal is denied by the court, then the Receiving Party may file the information
2 in the public record unless otherwise instructed by the court.

3
4 13. FINAL DISPOSITION

5 After the final disposition of this Action, as defined in paragraph 4, within 60
6 days of a written request by the Designating Party, each Receiving Party must return
7 all Protected Material to the Producing Party or destroy such material. As used in
8 this subdivision, "all Protected Material" includes all copies, abstracts, compilations,
9 summaries, and any other format reproducing or capturing any of the Protected
10 Material. Whether the Protected Material is returned or destroyed, the Receiving
11 Party must submit a written certification to the Producing Party (and, if not the same
12 person or entity, to the Designating Party) by the 60 day deadline that (1) identifies
13 (by category, where appropriate) all the Protected Material that was returned or
14 destroyed and (2) affirms that the Receiving Party has not retained any copies,
15 abstracts, compilations, summaries or any other format reproducing or capturing any
16 of the Protected Material. Notwithstanding this provision, Counsel are entitled to
17 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing
18 transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert
19 reports, attorney work product, and consultant and expert work product, even if such
20 materials contain Protected Material. Any such archival copies that contain or
21 constitute Protected Material remain subject to this Protective Order as set forth in
22 Section 4 (DURATION).

23 14. VIOLATION

24 Any violation of this Order may be punished by appropriate measures including,
25 without limitation, contempt proceedings and/or monetary sanctions.

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2
3 Dated: October 7, 2024

Respectfully submitted,
DOVEL & LUNER, LLP

4
5 By: /s/ Jonas B. Jacobson
6 Jonas B. Jacobson (SBN 269912)

7 **BURSOR & FISHER, P.A.**
8 Brittany S. Scott (SBN 327132)

9 **LAW OFFICES OF TODD M.**
10 **FRIEDMAN**
11 Todd M. Friedman (SBN 216752)

12 **LEVI & KORSINSKY, LLP**
13 Mark S. Reich (admitted *pro hac vice*)
14 Courtney E. Maccarone (admitted *pro*
hac vice)

15 *Counsel for Plaintiffs*

16 Dated: October 7, 2024

DAVIS WRIGHT TREMAINE, LLP

17 By: /s/ James H. Moon
18 James H. Moon (SBN 268125)
19 Jacob M. Harper (SBN 259463)
20 Sancho Accorsi (SBN 329413)
Counsel for The Kroger Company

21 **Attestation**

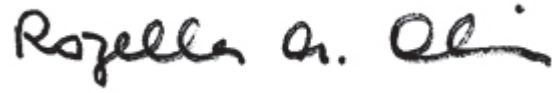
22 Pursuant to L.R. 5-4.3.4(a)(2)(i), I, Jonas B. Jacobson, attest that all signatories
23 identified above, and on whose behalf the filing is submitted, concur in the filing's
24 content and have authorized the filing.

25 Dated: October 7, 2024

26 By: /s/ Jonas B. Jacobson
27 Jonas B. Jacobson
28

1 FOR GOOD CAUSE SHOWN, IT IS SO ORDERED.
2
3
4

5
6 Dated: 10/8/2024



HON. ROZELLA A. OLIVER
United States Magistrate Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of perjury
that I have read in its entirety and understand the Stipulated Protective Order that
was issued by the United States District Court for the Central District of California
on [date] in the case of *Davis et al. v. the Kroger Company*, 2:22-cv-02082-MEMF-
RAO. I agree to comply with and to be bound by all the terms of this Stipulated
Protective Order and I understand and acknowledge that failure to so comply could
expose me to sanctions and punishment in the nature of contempt. I solemnly
promise that I will not disclose in any manner any information or item that is subject
to this Stipulated Protective Order to any person or entity except in strict compliance
with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Central District of California for enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and
telephone number] as my California agent for service of process in connection with
this action or any proceedings related to enforcement of this Stipulated Protective
Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____